

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JESSE VARGISON and RACHAEL FORBIS, individually and on behalf of themselves and all others similarly situated, et al.,

Plaintiffs,

v.

PAULA'S CHOICE, LLC, et al.,

Defendants.

CASE NO. 2:24-cv-00342-TL

ORDER ON MOTION TO COMPEL ARBITRATION AND STAY LITIGATION AS TO CERTAIN NAMED PLAINTIFFS

This matter comes before the Court on Defendant Paula's Choice, LLC's ("Paula's Choice") Motion to Compel Arbitration and to Stay Litigation as to Certain Named Plaintiffs. Dkt. No. 48. Having considered the motion, Plaintiffs' response (Dkt. No. 57), Paula's Choice's reply (Dkt. No. 61), the supplemental materials provided by the Parties (Dkt. Nos. 49, 58, 62), and the relevant record, the Court GRANTS IN PART and HOLDS IN ABEYANCE IN PART Paula's Choice's motion.

## I. BACKGROUND

Paula’s Choice is a company that manufactures and sells skincare products. See Dkt. No. 37 ¶¶ 131, 138 (“Amended Complaint”). In the underlying complaint, some 107 plaintiffs have brought this action against Paula’s Choice, alleging, among other things, that the company misrepresented to consumers that its products were “cruelty-free” and “never tested on animals,” despite “conducting animal tests in China in order to register and sell its products there.” *Id.* ¶¶ 9–115, 145, 1246. Plaintiffs have also named as Defendants Sephora USA, Inc. (“Sephora”) and THG Beauty USA LLC (“THG Beauty”), two retailers by whom Paula’s Choice products are sold. *Id.* ¶¶ 117–118. In the instant motion, Paula’s Choice seeks to compel eight particular Plaintiffs to arbitrate their claims against the company, pursuant to an arbitration clause found in the company’s Terms of Use. Dkt. No. 48 at 6; *see* Dkt. No. 49 at 31–32 (arbitration provision in Terms of Use). “Given their agreements to arbitrate,” Paula’s Choice asserts, “their claims do not belong in this Court.” Dkt. No. 48 at 6.

Paula’s Choice obliges its customers to accept its Terms of Use when making purchases on its website. *See* Dkt. No. 48 at 15; *see also* Dkt. No. 49 at 28–33 (“Terms of Use”). Prior to on or about March 14, 2023, the Terms of Use did not include an agreement to arbitrate. Dkt. No. 37 ¶ 1226. But on or about that date, the company added such an agreement to its Terms of Use. *Id.*; *see* Dkt. No. 59 at 31–32.

The arbitration provision states, among other things, that: “[CUSTOMERS] AND PAULA’S CHOICE EACH AGREE THAT ANY AND ALL DISPUTES OR CLAIMS THAT ARISE OR HAVE ARisen BETWEEN YOU AND PAULA’S CHOICE SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION RATHER THAN IN COURT.” Dkt. No. 48 at 17; Dkt. No. 49 at 31 (capitals in original). The arbitration provision also includes a class-action waiver, which requires that customers bring any claims

1 against the company on an individual basis: “You and Paula’s Choice agree that each of us may  
 2 bring claims against the other only on an individual basis and not as a plaintiff or class member in  
 3 any purported class or representative action or proceeding.” Dkt. No. 48 at 17; Dkt. No. 49 at 32.

4 Consequently, from Paula’s Choice’s perspective, customers who made purchases from  
 5 the website after March 14, 2023, are subject to the updated Terms of Use and the mandatory  
 6 arbitration provision quoted above—and are therefore barred from participating as plaintiffs in  
 7 this lawsuit. *See* Dkt. No. 48 at 16. Plaintiffs, however, dispute the validity of the arbitration  
 8 provision and assert that because they never agreed to it, it is unenforceable against them. *See*  
 9 Dkt. No. 57 at 5–6.

## 10                   **II.        LEGAL STANDARD**

11                  The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2 *et seq.*, governs arbitration  
 12 agreements in most contracts affecting interstate commerce. *See Circuit City Stores, Inc. v.*  
 13 *Adams*, 532 U.S. 105, 119 (2001) (holding that only contracts of employment of transportation  
 14 workers are exempted from FAA’s coverage). District courts have jurisdiction to determine  
 15 whether there is an agreement to arbitrate a particular issue, “unless the parties clearly and  
 16 unmistakably provide otherwise.” *In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011).

17                  In deciding whether to compel arbitration, a court’s inquiry is generally limited to two  
 18 “gateway” issues: “(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether  
 19 the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,  
 20 207 F.3d 1126, 1130 (9th Cir. 2000). If both conditions are met, “[t]he [FAA] requires the court to  
 21 enforce the arbitration agreement in accordance with its terms.” *Id.* Arbitration agreements “shall  
 22 be valid, irrevocable, and enforceable” in the absence of legal or equitable grounds such as fraud,  
 23 duress, or unconscionability. 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333,  
 24 339 (2011) (internal citations omitted). Where “[t]he crux of the complaint is that the contract as

1 a whole (including its arbitration provision) is . . . invalid,” even the validity of the contract  
 2 becomes a question for the arbitrator to decide. *Buckeye Check Cashing, Inc. v. Cardega*, 546  
 3 U.S. 440, 444–46 (2006).

4 A motion to compel arbitration “is in effect a summary disposition of the issue of  
 5 whether or not there had been a meeting of the minds on the agreement to arbitrate,” so courts  
 6 apply the summary judgment standard when evaluating such a motion. *Hansen v. LMB Mortg.*  
 7 *Serv., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021). Therefore, any evidentiary doubts are resolved in  
 8 favor of the non-moving party. However, “[if] a district court concludes that there are genuine  
 9 issues of material fact as to whether the parties formed an arbitration agreement, the court must  
 10 proceed without delay to a trial on arbitrability and hold any motion to compel arbitration in  
 11 abeyance until the factual issues have been resolved.” *Id.*; see 9 U.S.C. § 4.

### 12 III. DISCUSSION

#### 13 A. Plaintiffs Who Made Purchases After Defendant’s Motion

14 As an initial matter, the Court notes that three of the eight Plaintiffs—Dalit Cohen,  
 15 Bridget Froelich, and Maura McCartan—made at least one additional purchase on the Paula’s  
 16 Choice website *after* Paula’s Choice filed its motion to compel arbitration. See Dkt. No. 61 at 17;  
 17 Dkt. No. 62 ¶ 22. Paula’s Choice filed the instant motion to compel on October 15, 2024. Dkt.  
 18 No. 48. Cohen made purchases on November 28, 2024, and December 13, 2024; Froelich made  
 19 purchases on October 19, 2024, November 26, 2024, November 27, 2024, and December 4,  
 20 2024; McCartan made a purchase on November 4, 2024. See Dkt. No. 62 ¶ 22. As Named  
 21 Plaintiffs in this case, and specifically as the subjects of the instant motion to compel, these three  
 22 Plaintiffs were put on notice of the existence of the arbitration agreement (and their acceptance  
 23 thereof upon making a purchase) when Paula’s Choice raised the issue in the ongoing litigation.  
 24 See *Nicosia v. Amazon.com, Inc.*, 815 F. App’x 612, 613–14 (2d Cir. 2020) (applying

1 Washington law and holding that “[Plaintiff] received notice of the arbitration clause no later  
 2 than . . . when [Defendant] filed a letter motion in this litigation raising the arbitration clause as a  
 3 ground for dismissal.”). Plaintiffs’ continuing to make purchases despite the ongoing litigation—  
 4 particularly as it relates to notice and acceptance of the Terms of Use—is “conduct that a  
 5 reasonable person would understand to constitute assent.” *In re Ring LLC Privacy Litig.*, No.  
 6 C19-10899, 2021 WL 2621197, at \*7 (C.D. Cal. June 24, 2021) (internal quotation marks and  
 7 citation omitted).<sup>1</sup> These three Plaintiffs’ post-motion purchases demonstrate their assent to the  
 8 website’s updated Terms of Use, including the arbitration provision. And importantly, when they  
 9 assented to the updated Terms of Use—and the newly included arbitration agreement—they agreed  
 10 to arbitrate with Paula’s Choice “disputes or claims that arise *or have arisen*.” Dkt. No. 49 at 31  
 11 (capitals removed) (emphasis added). That is, even those disputes or claims that pre-date the  
 12 arbitration agreement fall within its scope. *See Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 878  
 13 (N.D. Cal. 2018) (finding that, under the unambiguous terms of the arbitration agreement, claims  
 14 that pre-date arbitration agreement are within its scope), *aff’d* 816 F. App’x 68 (9th Cir. 2020).  
 15 Plaintiffs Cohen, Froelich, and McCartan might have maintained claims that *were* eligible to be  
 16 litigated in court, but once they assented to the updated Terms of Use, the arbitration agreement  
 17 extinguished such eligibility. *See Sanfilippo v. Tinder, Inc.*, No. C18-8372, 2018 WL 6681197, at  
 18 \*5 (C.D. Cal. Dec. 18, 2018) (compelling arbitration of claims that pre-date arbitration agreement  
 19 where agreement “d[id] not appear to intend to limit arbitration to future claims”), *aff’d sub nom.*  
 20 *Sanfilippo v. Match Group LLC*, No. 20-55819, 2021 WL 4440337, at \*2 (9th Cir. Sept. 28, 2021).  
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23 <sup>1</sup> Plaintiffs could have sought leave from the Court to submit additional briefing in response to Paula’s Choice’s  
 24 assertions about the ramifications of Cohen’s, Froelich’s, and McCartan’s subsequent purchases on the website—  
 assertions that were, necessarily, raised for the first time in a reply brief, since the purchases were made after the  
 motion was filed—but they opted not to do so.

With respect to these Plaintiffs' claims against Defendants Sephora and THG Beauty—  
 Parties with whom Cohen, Froelich, and McCartan do not have an arbitration agreement—"it is  
 in the Court's discretion whether to stay, for considerations of economy and efficiency, an entire  
 action, including issues not arbitrable, pending arbitration." *Maguire Ins. Agency, Inc. v. Amynta*  
*Agency, Inc.*, 652 F. Supp. 3d 1313, 1327 (W.D. Wash. 2023) (quoting *Kater v. Churchill Downs*  
*Inc.*, No. C15-612, 2019 WL 3944323, at \*1 (W.D. Wash. Aug. 21, 2019)). Courts "generally  
 grant" stays when "the plaintiff's claims against a non-signatory defendant are intertwined with  
 their arbitrable claims against another defendant." *Kater*, 2019 WL 3944323, at \*2. Further, "[i]f  
 the four corners of the complaint make clear that the non-arbitrable claims depend upon the same  
 facts as and are inherently separable from the remainder of the arbitrable claims, a stay of all  
 claims is appropriate." *Smiles Servs. LLC v. Frye*, No. C23-5492, 2023 WL 6066683, at \*2  
 (W.D. Wash. Sept. 18, 2023) (quoting *Maguire Ins.*, 652 F. Supp. 3d at 1328) (cleaned up).

Here, it is not clear from the four corners of the Amended Complaint that Plaintiffs  
 Cohen, Froelich, and McCartan have claims against Sephora and THG Beauty that "depend on  
 the same facts as and are inherently separable from" their arbitrable claims against Paula's  
 Choice. As to these Plaintiffs' respective purchase(s) of Paula's Choice products, the Amended  
 Complaint asserts that each "purchased Paula's Choice products either directly from Paula's  
 Choice or from a third-party retailer on or after December 22, 2009." Dkt. No. 37 ¶¶ 348, 390,  
 796 (emphasis added). Plaintiffs' decision not to identify the retailer from whom these Plaintiffs  
 purchased their Paula's Choice merchandise renders it unclear whether these Plaintiffs even have  
 claims against Sephora and THG Beauty. Moreover, "[i]f the Court stayed the entire litigation  
 and allowed [Cohen's, Froelich's, and McCartan's] arbitrations to proceed to completion first, it  
 is unclear what preclusive effect the arbitrations would have on [these Plaintiffs'] remaining

1 class action claims.” *Gile v. Dolgen Cal., LLC*, No. C20-1863, 2022 WL 649279, at \*2 (C.D.  
 2 Cal. Jan. 14, 2022).

3 For its part, Paula’s Choice asserts only that a “stay should also apply as to these  
 4 Plaintiffs’ claims to the extent asserted against Defendants Sephora or THG Beauty USA,  
 5 although none of these eight Plaintiffs has alleged that they made a purchase from Sephora and  
 6 Dermstore<sup>[2]</sup> and thus have such a claim.” Dkt. No. 48 at 29. Nor does the arbitration clause in  
 7 Paula’s Choice’s Terms of Use appear to apply to Defendants Sephora or THG Beauty, as the  
 8 relevant language is limited and specific to Paula’s Choice: A customer agrees that “ANY AND  
 9 ALL DISPUTES OR CLAIMS THAT ARISE OR HAVE ARISEN *BETWEEN YOU AND*  
 10 *PAULA’S CHOICE* SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND  
 11 BINDING ARBITRATION.” Dkt. No. 49 at 31 (capitals in original) (emphasis added).

12 Presented with no good reason to set the stage for what would potentially become a third act in  
 13 this drama—that is, further judicial proceedings after both the pending lawsuit now before the  
 14 Court and the three Plaintiffs’ compelled arbitration with Paula’s Choice—the Court declines to  
 15 stay any claims Cohen, Froelich, and McCartan might have against Sephora and THG Beauty.  
 16 Therefore, the Court GRANTS Paula’s Choice’s motion to compel arbitration as to Plaintiffs  
 17 Cohen, Froelich, and McCartan, and STAYS these Plaintiffs’ claims against Paula’s Choice,  
 18 pending arbitration.

19 **B. Other Plaintiffs**

20 The Court now turns to the five Plaintiffs who did not make purchases after Paula’s  
 21 Choice filed its Motion: Bartholomew-King, Bridges, Erriquez, van der Steeg, and Wright. “The  
 22 cardinal precept of arbitration is that it is ‘simply a matter of contract between the parties; it is a  
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24 <sup>2</sup> Dermstore.com is operated by THG Beauty LLC. See Dkt. No. 37 ¶ 118.

1 way to resolve those disputes—but only those disputes—that the parties have agreed to submit to  
 2 arbitration.”” *Ahlstrom v. DHI Mortg. Co., Ltd.*, 21 F.4th 631, 634 (9th Cir. 2021) (quoting *Loc.  
 3 Joint Exec. Bd. v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 595 (9th Cir. 2018) (quoting *First  
 4 Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995))). “Because of this axiomatic principle,  
 5 a party cannot be required to submit to arbitration any dispute which he has not agreed so to  
 6 submit.” *Id.* (quoting *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1041 (9th Cir.  
 7 2020)). Accordingly, the United States Supreme Court has instructed that “courts should order  
 8 arbitration of a dispute only where the court is satisfied that neither the formation of the parties’  
 9 arbitration agreement nor (absent a valid provision specifically committing such disputes to an  
 10 arbitrator) its enforceability or applicability to the dispute is in issue.” *Id.* (quoting *Granite Rock  
 11 Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010)). “Thus, ‘where a party contests either  
 12 or both matters, the court must resolve the disagreement.’” *Id.* (quoting *Granite Rock*, 561 U.S.  
 13 at 299–300). As articulated above, the summary-judgment standard is appropriate when making  
 14 this determination. *Hansen*, 1 F.4th at 670.

## 15       1.     **Governing Law**

16       In determining whether a contract exists, courts must apply “ordinary state-law principles  
 17 that govern the foundation of contracts.” *First Options of Chi., Inc.*, 514 U.S. at 944; *see also  
 18 Marshall v. Hipcamp Inc.*, No. C23-6156, 2024 WL 2325197, at \*3 (W.D. Wash. May 22, 2024).  
 19 “The Court, sitting in diversity, applies the forum state’s choice of law rules.” *Marshall*, 2024  
 20 WL 2325197, at \*3 (citing *Atl. Marine Const. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571  
 21 U.S. 49, 65 (2013)).

22       “Under Washington law, the threshold question is whether there is an actual conflict with  
 23 another state’s law.” *Id.* (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 103, 864 P.2d  
 24 937 (1994)). “An actual conflict of law exists where the result of an issue is different under the

1 laws of the interested states.” *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016). If  
 2 there is no actual conflict, the Court applies “the presumptive local law.” *Erwin v. Cotter Health*  
 3 *Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007).

4 In this matter, the presumptive local law is that of Washington. *See Burnside*, 123 Wn.2d  
 5 at 100 (establishing “several principles that serve as a useful starting point in choice of law  
 6 analysis,” including that “the normal expectation should be that the rule of decision will be  
 7 supplied by the domestic law as a matter of course”; that “[t]he court should ordinarily depart  
 8 from this procedure only at the instance of a party wishing to obtain the advantage of a foreign  
 9 law”; and that “[t]he law of the forum . . . should normally be displaced only by the interested  
 10 party’s timely invocation of the foreign law”). Neither Party expressly asserts that the instant  
 11 motion is governed by Washington (or any other state’s) contract law. However, both Plaintiff  
 12 and Defendant apply Washington law in their briefing and cite as authority federal cases that  
 13 apply Washington law. *See, e.g.*, Dkt. No. 48 at 21; Dkt. No. 57 at 14.<sup>3</sup> As neither party has  
 14 invoked any foreign law and no “actual conflict of law” exists, the Court will apply Washington  
 15 law to determine whether the eight Plaintiffs with whom Paula’s Choice now seeks to compel  
 16 arbitration are bound by the company’s Terms of Use.

17 **2. Formation of a Contract**

18 “Contract formation requires mutual assent.” *Marshall*, 2024 WL 2325197, at \*5 (citing  
 19 *Reichart v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227 (9th Cir. 2022) (applying Washington law)  
 20 (citing *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)). In the online  
 21

22 <sup>3</sup> A choice-of-law clause in the Paula’s Choice Terms of Use provides that Washington law governs use of the  
 23 company’s website. *See* Dkt. No. 58-10 at 6. “But whether the choice of law provision applies depends on whether  
 24 the parties agreed to be bound by [the] Terms of Use in the first place.” *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d  
 1171, 1175 (9th Cir. 2014). This is precisely the issue under examination here and, therefore, the Court cannot  
 presumptively apply the choice-of-law provision.

1 context, mutual assent “turns on whether the consumer had reasonable notice of the terms of  
 2 service agreement.” *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1219 (9th Cir. 2019) (applying  
 3 Washington law). There are two general types of online contracts: “clickwrap” agreements,  
 4 which present “users with specified contractual terms on a pop-up screen [where] users must  
 5 check a box explicitly stating ‘I agree’ in order to proceed,” and “browsewrap” agreements,  
 6 where the website “offers terms that are disclosed only through a hyperlink.” *Berman v. Freedom*  
 7 *Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022). In contrast to clickwrap agreements,  
 8 which are routinely considered enforceable, browsewrap agreements are less commonly enforced  
 9 “because consumers are frequently left unaware that contractual terms were even offered, much  
 10 less that continued use of the website will be deemed to manifest acceptance of those terms.” *Id.*

11 Ninth Circuit courts have also recognized a subspecies of agreement called “modified  
 12 clickwrap.” See, e.g., *Rocha v. Urban Outfitters, Inc.*, No. C23-542, 2024 WL 393486, at \*3  
 13 (N.D. Cal. Feb. 1, 2024); *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 763 (N.D. Cal.  
 14 2019); see also *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1176–77 (9th Cir. 2014). “These  
 15 contracts exist where a ‘signup screen states that acceptance of a separate agreement is required  
 16 before the user can access the service.’” *Rocha*, 2024 WL 393486, at \*3 (citing *JUUL Labs*, 402  
 17 F. Supp. 3d at 763). “Courts are ‘more willing to find the requisite notice for constructive assent  
 18 where the browsewrap agreement resembles a clickwrap agreement . . . [and] the website  
 19 contains an explicit textual notice that continued use will act as a manifestation of the user’s  
 20 intent to be bound.’” *Id.* (quoting *Nguyen*, 763 F.3d at 1176–77).

21 Courts confronted with online agreements have devised rules to determine whether  
 22 meaningful assent has been given in order to avoid the unfairness of enforcing contractual terms  
 23 that consumers never intended to accept. See *Patrick v. Running Warehouse, LLC*, 93 F.4th 468,  
 24 476 (9th Cir. 2024) (citing *Berman*, 30 F.4th at 856). Unless a website operator can show actual

knowledge of an agreement by a consumer, an enforceable contract will be found only where: “(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.” *Id.*; see also *Wilson*, 944 F.3d at 1220. “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.” *Id.* (quoting *Berman*, 30 F.4th at 856).

To determine whether a website provides reasonably conspicuous notice, courts consider, among other things, “the transactional context, the notice’s size relative to other text on the site, the notice’s proximity to the relevant button or box the user must click to complete the transaction or register for the service, and whether the notice’s hyperlinks are readily identifiable.” *Berman*, 30 F.4th at 868 (Baker, J., concurring). “[The] notice must be displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it.” *Id.* at 856. Additionally, “while it is permissible to disclose terms and conditions through a hyperlink, the fact that a hyperlink is present must be readily apparent. Simply underscoring words or phrases . . . will often be insufficient to alert a reasonably prudent user that a clickable link exists.” *Id.* at 857. “Customary design elements denoting the existence of a hyperlink include the use of a contrasting font color (typically blue) and the use of all capital letters, both of which can alert a user that the particular text differs from other plain text in that it provides a clickable pathway to another webpage.” *Id.* “Ultimately, ‘the conspicuousness and placement of the Terms of Use hyperlink, other notices given to users of the terms of use, and the website’s general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.’” *Benson v. Double Down Interactive, LLC*, No. C18-525, 2018 WL 5921062, at \*3 (W.D. Wash. Nov. 13, 2018) (quoting *Nguyen*, 763 F.3d at 1177).

1           **3. Notice of Terms of Use**

2         Here, the Notice in question on Paula’s Choice’s website reads, “By continuing, you  
 3 agree to our Terms of Use. For more information about our privacy practices, please see our  
 4 Privacy Policy.” Dkt. No. 48 at 10. “Terms of Use” and “Privacy Policy” are underlined and  
 5 hyperlinked; the hyperlinked and non-hyperlinked text are displayed in the same color. *Id.*

6           **a. Disputed Notices in the Purchasing Process**

7         The Parties dispute whether a Paula’s Choice customer actually encounters the Notice  
 8 when purchasing products on the website. *Compare* Dkt. No. 48 at 20 (“[Plaintiffs] affirmatively  
 9 assented to the Terms at least twice during the checkout process.”), *with* Dkt. No. 57 at 7 (“A  
 10 returning customer—such as the Plaintiffs here—can purchase products from the Paula’s Choice  
 11 desktop or mobile website without once seeing any reference to the Terms of Use.”). This is a  
 12 genuine issue of material fact. *See* Fed. R. Civ. P. 56(a). Along with its reply brief, Paula’s  
 13 Choice provides a declaration and exhibits that illustrate the multipage purchase flow for some,  
 14 but not all, of the remaining five Plaintiffs. *See generally* Dkt. No. 62 at 8–26. But Plaintiffs did  
 15 not seek the Court’s leave to file any rebuttal to this evidence and, in any event, Paula’s Choice’s  
 16 submissions do not cover all five Plaintiffs for whom the existence of an agreement to arbitrate  
 17 remains in dispute.

18         The Court notes that the Parties appear to agree that, at the very least, a customer is  
 19 presented with the Notice on the “Order Review/Submit Order” page from which a customer  
 20 submits their order for purchase. *See* Dkt. No. 57 at 9. Plaintiffs argue that it is possible to submit  
 21 an order from this page without having seen the Notice, depending on the size and resolution of a  
 22 customer’s screen, as well as the customer’s willingness to scroll through the entire page, but  
 23 they do not suggest that the Notice is completely absent. *Id.* In other words, it is undisputed that  
 24 the Notice *can* be seen on that page; that is, the Notice is part of the “design element” of the

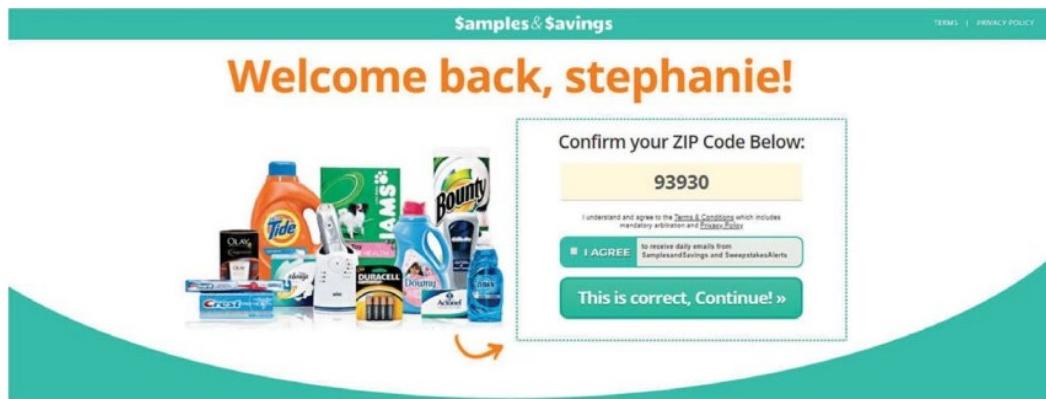
1 “Order Review/Submit Order” page. *See Berman*, 30 F.4th at 857. If the Notice on the “Order  
 2 Review/Submit Order” page is sufficient, then the Court need not concern itself with the dispute  
 3 over whether the notice appears on other pages—after all, all customers can see the Notice on  
 4 that page. But if the “Order Review/Submit Order” Notice is not sufficient, then whether  
 5 customers may have seen the Notice on a different page, at other times in the purchasing process,  
 6 is crucial to determining whether customers agreed to the Terms of Use. *See Oberstein v. Live*  
 7 *Nation Ent., Inc.*, 60 F.4th 505, 516 (9th Cir. 2023) (finding sufficient notice where it was  
 8 “conspicuously displayed directly above or below the action button *at each of three independent*  
 9 *stages that a user must complete before purchasing tickets*” (emphasis added)). In other words,  
 10 the frequency with which a customer is presented with the notice—and/or its serial presentation  
 11 in the purchasing process—can augment its sufficiency. The Court will thus first examine the  
 12 sufficiency of the Notice on the “Order Review/Submit Order” page under the principles  
 13 established by the Ninth Circuit in *Berman*.

14           **b.       “Order Review/Submit Order” Page Notice**

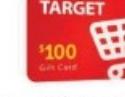
15 Plaintiffs argue that the Notice on the “Order Review/Submit Order” page is insufficient  
 16 to bind customers to the Terms of Use. They assert that the text appears in “hard-to-read fine  
 17 print [that] does not conspicuously inform the customer that the Terms of Use are linked at all, as  
 18 they appear in small black font.” Dkt. No. 57 at 18. Further, “[t]he words ‘Terms of Use’ are  
 19 merely underscored,” and do not appear in “a different color, all capital letters, a prominent  
 20 button, [or include] other unambiguous design elements to signal that a link exists.” *Id.* at 18–19.  
 21 When all these purported shortcomings are taken into consideration, Plaintiffs argue, Paula’s  
 22 Choice’s “failure to provide conspicuous notice of the [Terms of Use] means they cannot be  
 23 enforced.” *Id.* at 19.

24

1 Ninth Circuit precedent supports Plaintiffs' position. In *Berman*, the Court of Appeals  
2 found that a website did not provide reasonably conspicuous notice of the terms and conditions  
3 where “[t]he text disclosing the existence of the terms and conditions . . . is printed in a tiny gray  
4 font considerably smaller than the font used in the surrounding website elements.” *Berman*, 30  
5 F.4th at 856. The “comparatively larger font” and “overall design of the website . . . draw[s] the  
6 user’s attention away from the barely readable critical text.” *Id.* at 857; see *Rocha*, 2024 WL  
7 393486, at \*4. The websites examined by *Berman* are reproduced below:



**Shipping Information Required**



Item #5160300095421




---

Complete your shipping information  
to continue towards your reward

---

First Name

---

Last Name

---

Street Address

---

ZIP Code

---

Telephone

---

**Date of Birth:**

MM	DD	1923
----	----	------

**Select Gender:**

Male	Female
------	--------

I understand and agree to the [Terms & Conditions](#)  
which includes mandatory arbitration and [Privacy Policy](#).

**Continue »**

<sup>1</sup> Berman, 30 F.4th at 859–61 (App’x A & App’x B).

Paula’s Choice’s website suffers from the same deficiencies. The Court notes that the text of the Notice is small and placed against a gray background, in contrast to the other information on the screen, which appears against a white background, in significantly larger type. *See* Dkt. No. 48 at 9, 10, 11. This has the effect of de-emphasizing the link to the Terms of Use, as the reduced contrast makes text on the rest of the screen appear highlighted. The tiny typeface exaggerates the effect.

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**PAULA'S CHOICE**  
SKINCARE

SHIPPING
 PAYMENT
3 REVIEW
4 COMPLETE

**Order Review**

Review the details of your order below and if everything looks right, click the "Submit Order" button.

**SUBMIT ORDER**

**Shipping**

**Shipping Address**  
John Doe  
1234 Main Street  
St. Louis, Missouri 63102  
United States

**Gift Message**  
No Message

**Shipping Method**  
Standard - \$0.00  
Arrives in 3 - 5 business days.

**Billing**

**Billing Address**  
John Doe  
1234 Main Street  
St. Louis, Missouri 63102  
United States

**Payment Method**  
 Visa ending in 1619

Your receipt will be sent to [testpurchase@gmail.com](mailto:testpurchase@gmail.com)

Due to safety measures and increased order volume, processing and shipping may take longer than usual. We appreciate your patience and apologize for the inconvenience.

**SUBMIT ORDER**

By continuing, you agree to our [Terms of Use](#). For more information about our privacy practices, please see our [Privacy Policy](#).

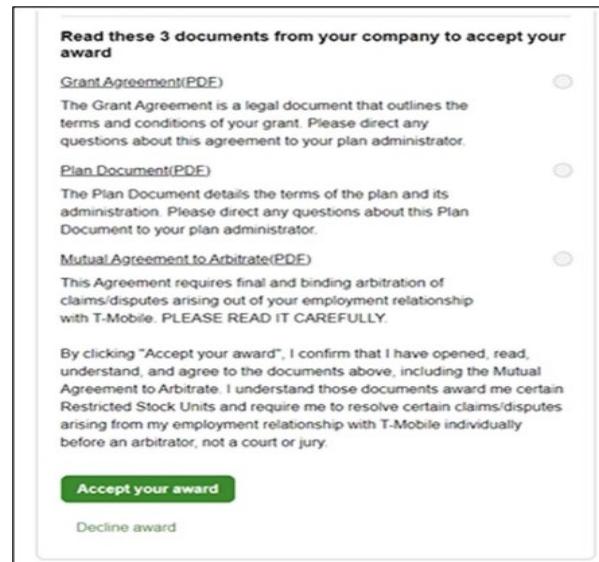
Chat

Dkt. No. 48 at 15.

For its part, Paula's Choice asserts that its "Terms of Use were noticeably hyperlinked, using either differently colored font or underlined text." *Id.* at 22. Paula's Choice compares its call-out to its Terms of Use with that in *Grant v. T-Mobile USA, Inc.*, where a court in this District held that a company's hyperlink to its Agreement to Arbitrate was conspicuous "because, *inter alia*, 'the color contrast between the hyperlink—black—and the background screen—white—was conspicuous enough to allow [plaintiff] to easily see the Agreement

1 hyperlink, rather than it being obscured from view.”” *Id.* at 23 (quoting *Grant v. T-Mobile USA, Inc.*, No. C23-1946, 2024 WL 3510937, at \*4 (W.D. Wash. July 23, 2024)).

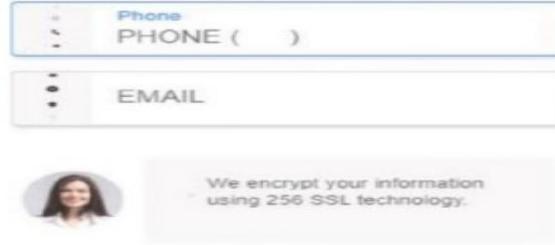
2 But Paula’s Choice’s use of “*inter alia*” obscures a significant piece of the *Grant* court’s  
 3 reasoning. The court there noted that the hyperlink, “*importantly*, is labeled with ‘(PDF)’ next to  
 4 the name of the document.” *Grant*, 2024 WL 3510937, at \*4 (emphasis added). The court  
 5 “[f]ound] that the inclusion and proximity of the file type in the hyperlinked text weigh[ed] in  
 6 favor of a reasonable user likely surmising that the underlined text differed from other plain text  
 7 in that it provides a clickable pathway to the Agreement.” *Id.* Further, T-Mobile’s hyperlink was  
 8 accompanied by a boldfaced *command* to **“Read these 3 documents from your company to  
 9 accept your award.”** *Id.* at \*1 (boldface in original). T-Mobile also provided notice to users that  
 10 one of the documents they were directed to read was specifically entitled “Mutual Agreement to  
 11 Arbitrate.” *Id.* T-Mobile then informed users a second time that by clicking on the “Accept your  
 12 award” link, users confirmed that they had “opened, read, understand[ed], and agree[d] to the  
 13 documents above, including the Mutual Agreement to Arbitrate.” *Id.* Finally, these two notices  
 14 about the arbitration agreement were placed directly above the “Accept your award” button, as  
 15 depicted below.  
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1 *Grant*, 2024 WL 3510937, at \*1. In contrast, Paula's Choice meekly advises customers that,  
 2 “[b]y continuing, [they] agree to our Terms of Use.” Dkt. No. 48 at 9.

3 Paula's Choice also compares its Terms of Use hyperlink to that in *Pizarro v. QuinStreet, Inc.*, which the district court found reasonably conspicuous because it “appear[ed] directly below  
 4 the ‘See My Rates’ button, [was] set off by ample white spacing, and [was] primarily surrounded  
 5 by text no larger than the notice itself.” No. C22-2803, 2022 WL 3357838, at \*3 (N.D. Cal. Aug.  
 6 15, 2022). The *Pizarro* court also credited “the general design of the webpage, which is  
 7 comprised of only two data fields, is relatively uncluttered and has a muted, essentially uniform,  
 8 color scheme.” *Id.*

10 **Last step to get your quotes**



15 **See My Rates**

16 By clicking See My Rates, you agree to the following:

17 To AmOne's [Privacy Notice](#), [Terms of Use](#), and [Consent to Receive Electronic Communications](#)

18 To share my information with up to five potential callers, lenders, or debt relief partners for AmOne, and for them and/or AmOne to contact you (including by automated dialing systems, prerecorded messages and text) for marketing purposes by telephone, mobile device (including SMS and MMS), and/or email, even if you are on a corporate, state or national Do Not Call list. Consent is not required in order to purchase goods and services and you may choose instead to contact a customer care representative at 1-800-781-5187.

19 You authorize AmOne to obtain your credit report and Social Security Number from a credit bureau to verify your identity and match you with up to five lenders or debt relief providers. You further authorize AmOne to provide to these lenders your full Social Security. You further authorize these lenders separately to obtain your consumer credit report, credit score, and other information from one or more consumer reporting agencies to verify your identity and provide you with quotes.

21 *Id.* at \*1.

22 But although this case is more apposite than *Grant*, the Court finds it significant that the  
 23 *Pizarro* notice specifically referenced the textual language on the button that consumers clicked  
 24 to agree to the terms of use and advance to the next screen. Paula's Choice, in contrast, advises

vaguely that a customer accepts its Terms of Use by “continuing.” Dkt. No. 48 at 9. As Plaintiffs ask, highlighting the ambiguity, “Continuing to what? The text fails to specify what specific action . . . the customer takes to indicate agreement to the Terms.” Dkt. No. 57 at 19. In *Kuhk v. Playstudios, Inc.*, this Court found it significant that the action *described* in website’s notice (“By clicking connect, you agree to our terms of service and privacy policy”) did not correspond to the action *taken by customers*—that is, there was no “connect” button to click. No. C24-460, 2024 WL 4529263, at \*7 (W.D. Wash. Oct. 18, 2024). Paula’s Choice’s website suffers from a similar infirmity.

Finally, the respective notices of terms were positioned directly above the “Accept Your Award” button in *Grant* and the “See My Rates” button in *Pizarro*, making it difficult for a user miss the notices when navigating to the action button. But on the Paula’s Choice website, there is not only a gap between the notice of the terms and the “Submit Order” button at the bottom of the page, but also a “Submit Order” button at the *top* of the same page, making it unnecessary for customers to even scroll all the way down to the Notice prior to placing their orders. Put differently, the design of Paula’s Choice’s website *facilitated* a customer’s overlooking or ignoring the Notice.

Therefore, under the Ninth Circuit’s standard established in *Berman*, the Court finds that Paula’s Choice’s notice is not reasonably conspicuous as it appears on the “Order Review/Submit Order” page. If that were the only instance where the Plaintiffs at issue encountered the Notice, then it would not be enforceable against them.

But as discussed above, the “Order Review/Submit Order” page might *not* be the only place where Plaintiffs encountered the Notice. Because Paula’s Choice’s Notice of its Terms might have been presented more frequently and more robustly than in the one-time Notice

1 analyzed above, the Court cannot conclude whether, when these Plaintiffs' *entire* purchasing  
 2 experiences are considered, their individual experiences purchasing products on the website  
 3 provided them with sufficient notice of the Terms of Service. *See Oberstein*, 60 F.4th at 516.  
 4 Under Section 4 of the FAA, then, this case must proceed "summarily to trial" on this issue.

5 Paula's Choice contemplated these circumstances in its Reply, asserting that, "Should the  
 6 Court nevertheless determine that individualized issues surrounding how each Plaintiff  
 7 experienced the Website and proceeded through the purchase flow . . . must be further  
 8 investigated to establish assent to the Terms of Use, it should hold the Motion in abeyance,  
 9 pending supplemental briefing with additional evidence." Dkt. No. 61 at 20. The Court construes  
 10 Paula's Choice's assertion as a request for limited discovery. *See Knapke v. PeopleConnect, Inc.*,  
 11 38 F.4th 824, 833 (9th Cir. 2022). For their part, Plaintiffs misstated the law when they acceded  
 12 that such a "factual dispute" might very well exist on this issue, but that if it did, its existence  
 13 would be "fatal" to Paula's Choice's motion. Dkt. No. 57 at 6. As both *Hansen*, its progeny, and  
 14 the FAA make clear, this dispute leaves the issue very much alive.

15 "[T]he FAA's procedure mirrors the three phases of federal civil lawsuits: a motion to  
 16 compel arbitration akin to a motion to dismiss; followed by optional discovery before summary  
 17 judgment, if the motion is denied; followed by a mini-trial, if necessary." *Knapke*, 38 F.4th at  
 18 833. Here, Paula's Choice has not demonstrated as a matter of law that it had an agreement to  
 19 arbitrate with five of the Plaintiffs at issue, so "the case moves to the next phase: discovery.  
 20 After discovery, the parties will brief—under the summary judgment standard—whether the  
 21 record establishes as a matter of law Plaintiffs entered into an arbitration agreement [with Paula's  
 22 Choice]. If there remains a genuine dispute, the case will proceed to trial on the issue of the  
 23 making of an arbitration agreement." *Noel v. Roblox Corp.*, No. C24-963, 2024 WL 3747454, at  
 24 \*6 (N.D. Cal. Aug. 8, 2024).

1 Therefore, as to Plaintiffs Bartholomew-King, Bridges, Erriquez, van der Steeg, and  
2 Wright, the Court HOLDS IN ABEYANCE Defendant's Motion to Compel Arbitration and to Stay  
3 Litigation (Dkt. No. 48).

4 **IV. CONCLUSION**

5 Accordingly, it is hereby ORDERED:

- 6 (1) Defendant Paula's Choice's Motion to Compel Arbitration and to Stay Litigation  
7 (Dkt. No. 48) is GRANTED IN PART and HELD IN ABEYANCE IN PART.
- 8 a. Plaintiffs Cohen, Froelich, and McCartan are ORDERED to pursue their  
9 claims in arbitration, as specified in their arbitration agreement, on an  
10 individual basis. Their claims against Defendant Paula's Choice are  
11 STAYED pending arbitration.
- 12 b. As to Plaintiffs Bartholomew-King, Bridges, Erriquez, van der Steeg, and  
13 Wright, the motion is HELD IN ABEYANCE.
- 14 (2) The Parties SHALL: (a) meet and confer; (b) file a joint report identifying a  
15 proposed timeline for limited discovery pertaining only to whether Plaintiffs  
16 Bartholomew-King, Bridges, Erriquez, van der Steeg, and Wright consented to  
17 the arbitration agreement and providing each Party's position as to whether this  
18 issue should proceed as a bench or jury trial; and (c) file a proposed trial schedule.

The joint report and proposed trial schedule SHALL be filed **no later than fourteen (14) days** after issuance of this Order.

- (3) With the exception of the issue to be tried, all pending motions and other dates in this case are STAYED until the question regarding whether the Parties have agreed to arbitrate has been resolved.

Dated this 30th day of January 2025.

Vera S.

Tana Lin  
United States District Judge